

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 156 (Sub-No. 27X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC.—DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION—IN BROOME COUNTY, N.Y.; MIDDLESEX, ESSEX, UNION, SOMERSET, HUNTERDON, AND WARREN COUNTIES, N.J.; CUMBERLAND, CHESTER, LUZERNE, PERRY, YORK, LANCASTER, NORTHAMPTON, LEHIGH, CARBON, BERKS, MONTGOMERY, NORTHUMBERLAND, DAUPHIN, LEBANON, AND PHILADELPHIA COUNTES, PA.; CECIL, HARFORD, BALTIMORE, ANNE ARUNDEL, AND PRINCE GEORGE’S COUNTIES, AND BALTIMORE CITY, MD.; THE DISTRICT OF COLUMBIA; AND ARLINGTON COUNTY, AND THE CITY OF ALEXANDRIA, VA.

Digest:<sup>1</sup> This decision denies several motions, petitions, and one appeal of a Director’s Order, all of which relate to a notice of exemption filed by the Delaware and Hudson Railway Company, Inc., to discontinue trackage rights over approximately 670 miles of rail line.

Decided: July 9, 2015

BACKGROUND

On March 19, 2015, Delaware and Hudson Railway Company, Inc. (D&H), submitted a verified notice of exemption under 49 C.F.R. § 1152.50 to discontinue overhead and local trackage rights on approximately 670 miles of rail line in New York, New Jersey, Pennsylvania, Maryland, the District of Columbia, and Virginia. Notice of this exemption was served and published in the Federal Register on April 8, 2015 (80 Fed. Reg. 18,937). That notice stated that, provided that no formal expression of intent to file an offer of financial assistance (OFA) to subsidize continued rail service was received, the exemption would become effective on May 8, 2015. The effective date of the exemption was extended to June 15, 2015, in an April 17, 2015 Board decision.

On April 20, 2015, James Riffin (Riffin) filed (1) a motion to consolidate this proceeding with the proceeding in Norfolk Southern Railway—Acquisition & Operation—Certain Rail

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Lines of the Delaware & Hudson Railway (NSR/D&H), Docket No. FD 35873,<sup>2</sup> (2) a petition to revoke D&H's discontinuance of trackage rights exemption in this proceeding, and (3) a notice of intent to file an OFA. Also on April 20, 2015, Samuel J. Nasca, on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), filed a petition to revoke and for stay of the exemption in this proceeding. On May 11, 2015, SMART/TD-NY filed a motion to strike a portion of D&H's May 8, 2015 reply to the petitions to revoke. On May 13, 2015, the Board, through the Director of the Office of Proceedings, issued a decision placing this proceeding into abeyance, and ordering D&H to supplement its verified notice of exemption with additional information, including Zip Codes and counties. On May 18, 2015, Riffin appealed the Director's abeyance decision to the entire Board. On June 15, 2015, D&H filed a supplement to its verified notice of exemption. Pursuant to that supplement, a corrected notice was served and published in the Federal Register on July 2, 2015 (80 Fed. Reg. 38,273).

Riffin's motion to consolidate and petition to revoke, SMART/TD-NY's petition to revoke and for stay, request to consolidate, and motion to strike, and Riffin's appeal of the Director's order will be denied. As discussed below, these filings are moot, beyond the scope of this proceeding, and/or without merit.

## DISCUSSION AND CONCLUSIONS

Requests to Consolidate. Riffin's April 20, 2015 motion to consolidate states that the Board should consolidate this proceeding with the proceeding in NSR/D&H because "[a]ll of the conditions requested" in NSR/D&H involve the trackage rights at issue here, and because "[i]t is the discontinuance of the trackage rights . . . which causes the transaction in [NSR/D&H] . . . to be 'anticompetitive.'"<sup>3</sup>

In addition, though SMART/TD-NY does not formally move to consolidate these proceedings, its April 20, 2015 petition to revoke and for stay of the exemption states: "[i]t is clear that NSR/D&H should be consolidated with this [proceeding]. This should be required, as exemplified by the STB's April 17, 2015 decision . . ."<sup>4</sup> On May 8, 2015, SMART/TD-NY

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<sup>2</sup> In that proceeding, Norfolk Southern Railway Company (NSR) filed an application seeking Board approval for the acquisition of 282.55 miles of rail line owned by D&H known as the D&H South Lines. On May 15, 2015, the Board issued a decision approving that application. Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry. (NSR/D&H May 15 Decision), FD 35873 (STB served May 15, 2015). That decision became effective on June 14, 2015.

<sup>3</sup> Riffin Mot. to Consolidate 1.

<sup>4</sup> SMART/TD-NY Pet. to Revoke & Stay 6. The Board's April 17, 2015 decision in this proceeding amended the effective date in this proceeding to coincide with the proposed effective date of the Board's final decision in NSR/D&H and was served on all parties in the NSR/D&H proceeding to ensure that parties in that proceeding had notice of the discontinuance proceeding and the opportunity to participate in it.

submitted a reply to Riffin’s motion to consolidate stating that it “supports consolidation in all pertinent respects.”<sup>5</sup>

On May 8, 2015, NSR filed a reply opposing consolidation, arguing that the Board had already determined that the proceedings in this case and in NSR/D&H are independent of each other, and that “any relationship between the [p]roceedings is not enough of a justification to warrant consolidation.”<sup>6</sup> On May 11, 2015, D&H filed a separate reply, arguing that D&H is “entitled to discontinuance authority independent[] of [NSR/D&H].”<sup>7</sup>

The Board has acknowledged that NSR/D&H and this proceeding are not unrelated to one another.<sup>8</sup> However, the Board has already issued a decision in NSR/D&H approving that transaction and finding no need to consolidate the two cases. NSR/D&H May 15 Decision, slip op. at 15-16, 20. As the Board concluded there, because the proposed discontinuances in this proceeding met the requirements of the two-year out-of-service class exemption under 49 C.F.R. § 1152.50, D&H’s authority to discontinue these trackage rights exists independent of the transaction approved in NSR/D&H. Moreover, neither Riffin nor SMART/TD-NY has shown that there is any necessary information regarding the trackage rights subject to this proceeding that would be made available only by consolidation. The motion and request to consolidate will therefore be denied.

Petitions to Revoke. Under 49 U.S.C. § 10502(d), the Board may revoke an exemption, in whole or in part, if the Board finds that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. See, e.g., Caldwell R.R. Comm’n—Exemption from 49 U.S.C. Subtitle IV, FD 32659 (Sub-No. 1), slip op. at 1-2 (STB served Nov. 26, 2014); Ind. Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Line Between Rochester & Argos, Ind., &—Exemption from 49 U.S.C. 10761, 10762, & 11144, FD 32162 et al., slip op. at 4 (STB served Jan. 30, 1998). The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns. Grenada Ry.—Acquis. & Operation Exemption—Ill. Cent. R.R., FD 35247 et al., slip op. at 6 (STB served Sept. 10, 2013); see also Consol. Rail Corp.—Trackage Rights Exemption—Mo. Pac. R.R., FD 32662, slip op. at 2 (STB served June 18, 1998); I&M Rail Link, LLC—Acquis. & Operation Exemption—Certain Lines of Soo Line R.R., FD 33326 et al., slip op. at 7 (STB served Apr. 2, 1997), aff’d sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). For example, the Board will revoke an exemption if a petitioner has demonstrated conduct that

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<sup>5</sup> SMART/TD-NY Reply to Mot. to Consolidate 3.

<sup>6</sup> NSR Reply to Riffin Mot. to Consolidate 5.

<sup>7</sup> D&H Reply to Mots. to Consolidate 2.

<sup>8</sup> Del. & Hudson Ry.—Discontinuance of Trackage Rights Exemption—in Broome Cnty., N.Y.; Essex, Union, Somerset, Hunterdon, & Warren Cntys., N.J.; Luzerne, Perry, York, Lancaster, Northampton, Lehigh, Carbon, Berks, Montgomery, Northumberland, Dauphin, Lebanon, & Phila. Cntys., Pa.; Harford, Balt., Anne Arundel, & Prince George’s Cntys., Md.; D.C.; & Arlington Cnty., Va., AB 156 (Sub-No. 27X), slip op. at 2 (STB served Apr. 17, 2015); NSR/D&H May 15 Decision, slip op. at 14-16.

frustrates the RTP and the Board has determined that the reinstated regulatory provisions could ameliorate the alleged harms. Entergy Ark. Inc. v. Union Pac. R.R., NOR 42104 et al., slip op at 16 (STB served Mar. 15, 2011); Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities—Pet. of G. & T. Terminal Packaging Co. to Revoke Conrail Exemption, 8 I.C.C. 2d 674, 676-77 (1992), aff'd in pertinent part sub nom. Mr. Sprout, Inc. v. United States, 8 F.3d 118 (2d Cir. 1993); Minn. Commercial Ry.—Trackage Rights Exemption—Burlington N. R.R., 8 I.C.C. 2d 31, 35-36 (1991) (the Board's revocation analysis "focuses on the sections of the RTP related to the underlying statutory section from which an exemption is sought").

*Riffin Petition to Revoke.* In his April 20, 2015 petition to revoke, Riffin argues that D&H's verified notice of exemption, as originally filed, did not include all of the Zip Codes, counties, and stations for the proposed trackage rights discontinuances.<sup>9</sup> Riffin further argues that D&H's notice of exemption did not include lines of railroad in several rail yards over which Riffin believes D&H is now or has in the past been the exclusive common carrier.<sup>10</sup> Riffin states that D&H intends to use this proceeding to obtain discontinuance authority over those lines, and argues that, because he believes D&H is the only common carrier on these lines, allowing D&H to discontinue trackage rights over these lines would effectively result in their abandonment.<sup>11</sup> Riffin states that he has served discovery requests on D&H related to all of these yards.<sup>12</sup>

D&H argues in reply that Riffin's petition to revoke should be denied because any errors and omissions in the names of counties and Zip Codes in D&H's notice were inadvertent, D&H made a good faith effort to submit an accurate notice and notify the public properly, and requiring "exacting compliance" would impose an undue regulatory burden on D&H.<sup>13</sup> D&H also argues that it did not list any stations because it does not have the ability to serve any stations on the lines.<sup>14</sup>

On May 12, 2015, Riffin filed a reply to D&H's reply to his petition to revoke, arguing that D&H did not give the public legally sufficient notice of its intent to discontinue the trackage rights subject to this proceeding,<sup>15</sup> and that questions remain as to whether D&H's traffic on

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<sup>9</sup> Riffin Pet. to Revoke 2-3; Riffin Suppl. 2 (May 7, 2015) (stating that D&H failed to include Cecil County, Md., in the heading of its notice of exemption).

<sup>10</sup> Riffin argues that D&H "failed to note that the D&H has lines of railroad in its Oak Island, NJ, and Bethlehem [sic], PA, yards," and that D&H "may have had the exclusive common carrier rights and obligations in portions of the Elizabethport and Greenville, NJ, yards, in a portion of the Bethlehem [sic], PA yard, and in a portion of the CNJ's freight yard, in the vicinity of MP 1.7 on the CNJ Main Line." Riffin Pet. to Revoke 4.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> D&H Reply to Pets. to Revoke Exemption 3-7.

<sup>14</sup> Id. at 5 n.3.

<sup>15</sup> Riffin Reply to D&H Reply to Riffin Pet. to Revoke 3-4.

several segments of the line is overhead or local.<sup>16</sup> Riffin also reiterates his belief that D&H will be using discontinuance authority to abandon certain operating rights that D&H has elsewhere.<sup>17</sup>

As noted above, on May 13, 2015, the Director of Proceedings placed this proceeding in abeyance pending D&H's supplementation of its original verified notice with corrected Zip Code and county information. On June 15, 2015, D&H filed a supplement to its verified notice of exemption, which includes updated Zip Codes, counties, and maps. D&H also stated that it would be republishing the required newspaper notices and providing corrected notices to the governmental agencies to which notice is required under 49 C.F.R. § 1152.50(d)(1).

With the June 15 supplement, D&H has met the regulatory requirements for a verified notice of exemption in this proceeding, including listing all affected Zip Codes and counties. This part of Riffin's petition to revoke is therefore moot.

To the extent that Riffin alleges that D&H will be discontinuing or abandoning any operations or trackage rights not included in its verified notice of exemption, those alleged discontinuances or abandonments are beyond the scope of this proceeding. D&H's original and supplemented verified notices of exemption only permit discontinuance of the 670 miles of trackage rights specifically listed therein.

Because the arguments in Riffin's petition to revoke are either moot or beyond the scope of this proceeding, Riffin's petition to revoke will be denied.

*SMART/TD-NY Petition to Revoke.* SMART/TD-NY's April 20, 2015 petition to revoke argues that D&H's use of the two-year out-of-service class exemption in this matter is improper.<sup>18</sup> SMART/TD-NY argues that the class exemption is not intended to "permit the discontinuance of overhead traffic," and that allowing this exemption to go forward "would turn the class exemption process and emphasis on its head, by placing overhead traffic as the primary concern, rather than local service for which the class exemption was designed."<sup>19</sup> SMART/TD-NY further argues that this is an improper use of the class exemption process because NSR and D&H have "bifurcated their proposal" into two transactions (this one and the NSR/D&H line sale), thereby allegedly "defeat[ing] the necessary overall examination of D&H's survival and other anti-competitive transportation consequences for the involved territory."<sup>20</sup>

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<sup>16</sup> Id. at 7, 8. D&H's verified notice of exemption certifies that there has been no local traffic on any of the lines subject to the notice for at least two years. Riffin states that he served a discovery request on D&H with regard to the origin/destination traffic on some segments of these lines, but has not received documentation from D&H. Id. On June 8, 2015, Riffin filed a motion to compel discovery. The Board will address that motion in a separate decision.

<sup>17</sup> Id. at 6, 9-10. Riffin states that he has requested documents from D&H related to these line segments but has not received the requested documents from D&H. Id.

<sup>18</sup> SMART/TD-NY Pet. to Revoke & Stay 4.

<sup>19</sup> Id. at 4, 5.

<sup>20</sup> Id. at 4.

D&H argues in reply that Board precedent permits the use of the class exemption process here. D&H further argues that under Board precedent it is unnecessary to consider the impact of trackage rights discontinuances on the discontinuing carrier.<sup>21</sup>

On May 11, 2015, SMART/TD-NY filed a motion requesting that the Board strike D&H's reply (and its accompanying verified statement of James D. Clements) "insofar as they attempt to deal with the SMART/TD-NY Petition to Revoke . . ." <sup>22</sup> SMART/TD-NY argues that D&H's reply to its petition to revoke is an attempt to support the merits of its exemption request, and that the reply "deprives SMART/TD-NY of an opportunity to respond to D&H's particularized evidence of each [rail] line." <sup>23</sup>

SMART/TD-NY's motion to strike D&H's reply will be denied. D&H's reply responds to specific arguments made in SMART/TD-NY's petition to revoke. As such, it is not "an attempt . . . to support an exemption request on the merits" <sup>24</sup> but is an appropriate reply to SMART/TD-NY's allegations, and it has given the Board a more complete record.

Contrary to SMART/TD-NY's claims, D&H did not err in using the two-year out-of-service class exemption for the discontinuances at issue here. D&H does not seek to discontinue overhead traffic on the lines subject to this proceeding. Instead, consistent with the class exemption regulations, D&H seeks to discontinue trackage rights over which, it certifies, there has been no local service in at least two years and any overhead traffic can be rerouted.<sup>25</sup> 49 C.F.R. § 1152.50(b).

Furthermore, as discussed elsewhere in this decision and in the NSR/D&H May 15 Decision, the Board does not believe NSR and D&H have improperly bifurcated any transaction.<sup>26</sup> The Board also disagrees with SMART/TD-NY's argument that this supposed "bifurcation" has defeated examination of D&H's continued survival and other consequences of the transactions between NSR and D&H. In approving the line sale transaction in NSR/D&H, the Board found that D&H is a struggling carrier and that the public interest supported allowing D&H to exit the market served by the D&H South Lines to be replaced with the stronger NSR. NSR/D&H May 15 Decision, slip op. at 20. The decision also noted that both the line sale transaction and the discontinuances would be positive, stating that "the acquisition transaction and the D&H discontinuances would allow D&H to focus its resources on areas it believes are more profitable." Id. at 21. Further analysis of the overall effects of the line sale and proposed discontinuances is not necessary or required under the Board's regulations, and in fact, further

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<sup>21</sup> D&H Reply to Pets. to Revoke Exemption 11.

<sup>22</sup> SMART/TD-NY Mot. to Strike 3.

<sup>23</sup> Id.

<sup>24</sup> SMART/TD-NY Mot. to Strike 3.

<sup>25</sup> D&H Verified Notice of Exemption 4 & Ex. C.

<sup>26</sup> See supra n.8 and accompanying paragraph.

analysis where a notice of exemption clearly meets the regulatory requirements under 49 C.F.R. § 1152.50 would frustrate the RTP. The RTP requires the Board to minimize the need for Federal regulatory control over the rail transportation system, to reduce regulatory barriers to entry into and exit from the industry, and to provide for the expeditious handling and resolution of all proceedings. 49 U.S.C. § 10101(2), (7), (15).

SMART/TD-NY has not met its burden of demonstrating that regulation in this matter is necessary to carry out the RTP or that the use of the class exemption process was improper here. Accordingly, its petition to revoke will be denied.

Petition to Stay. SMART/TD-NY offers conclusory assertions in support of its claim that its petition to stay meets the standards laid out in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) and Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958). Specifically, SMART/TD-NY avers that “protestants have a strong likelihood of success on their class exemption claim”; that “[r]ailroad employees will suffer irreparable injury if the discontinuances take effect, and are later set aside”; and that “[t]he carriers will not be injured by a stay pending ultimate determination of the petition to revoke/reject.”<sup>27</sup> However, SMART/TD-NY does not offer any precedent or evidence to support its claims. SMART/TD-NY has thus failed to make any showing that it would suffer irreparable harm if D&H were permitted to discontinue the trackage rights at issue here. Nor has SMART/TD-NY shown a likelihood that it would prevail on the merits of its petition to revoke D&H’s use of the class exemption for these discontinuances. SMART/TD-NY’s petition to stay will therefore be denied.

SMART/TD-NY further argues, in the alternative or in addition, that due process requires that the date for filing petitions to stay in this proceeding be extended to run with the stay deadline in NSR/D&H.<sup>28</sup> However, the reissued notice of exemption served and published in the Federal Register on July 2, 2015, following D&H’s filing of supplemental information, set a new procedural schedule in this proceeding, including a new deadline for the filing of petitions to stay (July 13, 2015). Therefore, SMART/TD-NY has not been denied due process, and its motion to extend the deadline to file a petition for stay will be denied.

Appeal of the Director’s Order. Under 49 C.F.R. § 1011.7(a)(2)(x)(D), the Board has delegated to the Director of the Office of Proceedings the authority to determine whether to issue notices of exemption from 49 U.S.C. § 10903 pursuant to 49 U.S.C. § 10502 and the implementing regulations at 49 C.F.R. § 1152.50. Under 49 C.F.R. § 1011.2(a)(7), the Board considers appeals of initial decisions issued by the Director under the authority delegated by 49 C.F.R. § 1011.7.

On May 18, 2015, Riffin appealed the Director’s May 13, 2015 order placing this proceeding in abeyance pending D&H’s supplementation of the omitted Zip Codes and counties in its verified notice of exemption. Riffin argues that the Director did not have the authority to

<sup>27</sup> SMART/TD-NY Pet. to Revoke & Stay 7-8.

<sup>28</sup> Id. at 7. The deadline for filing a petition to stay in NSR/D&H was June 4, 2015.

allow D&H to supplement its notice with corrected information, and instead should have rejected the notice pursuant to 49 C.F.R. § 1152.50(d)(3).<sup>29</sup> Riffin also argues that the Director’s order erred in not requiring D&H to republish the corrected notice of exemption or re-notify the parties to which notice is required under 49 C.F.R. § 1152.50(d)(1).

Riffin relies on 49 C.F.R. § 1152.50(d)(3), which states that “[i]f the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Board shall summarily reject the exemption notice.” Riffin argues that the information provided by D&H in its original verified notice was false and misleading because D&H had certified that the notice contained all of the Zip Codes and counties that the trackage rights subject to the notice traverse, when the notice did not in fact contain all of this information.<sup>30</sup> Riffin argues that the Director did not have discretion to permit D&H to supplement the information in its original verified notice and to “falsely certify[]” that it provided proper notice to the required parties.<sup>31</sup>

In reply, D&H argues that the Director acted properly in permitting the supplementation and that the technical deficiencies in D&H’s original verified notice were inadvertent and not material.<sup>32</sup>

Given the circumstances presented here, the Board concludes that the Director did not err in placing this proceeding in abeyance and ordering D&H to supplement its original notice, rather than rejecting the notice outright. The Director’s decision to require D&H to supplement its notice was an acceptable exercise of discretion within the authority delegated by the Board. While the Board has denied exemption authority in the past where the notices contained errors or inconsistencies, *see, e.g., Norfolk S. Ry.—Aban. Exemption—in Balt. Cnty., Md.*, AB 290 (Sub No. 237X) (STB served Apr. 3, 2006) (denying without prejudice petition for exemption where the petition contained errors including incorrect milepost numbers, missing zip codes and stations, and unaddressed potential stranded rail segments), the Board also has allowed parties to supplement their original filings with corrected information and to move forward with the exemption under circumstances similar to those involved here, *see, e.g., Signal Specialties, Inc.—Operation Exemption—Line in Buchanan Cnty., Mo.*, FD 35909 (STB served Mar. 26, 2015) (stating in notice of exemption that party filing the notice had supplemented original filing, and that date of supplement was considered the filing date).<sup>33</sup>

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<sup>29</sup> Riffin Notice of Appeal 4-5.

<sup>30</sup> *Id.* at 3-4.

<sup>31</sup> *Id.* at 5. Riffin also argues that D&H should be required to republish notice of its exemption in newspapers of general circulation in the counties in which the trackage rights are located. *Id.* at 5-7. Because D&H stated in its supplement that it is republishing these newspaper notices, this issue is moot, and the Board need not address it.

<sup>32</sup> D&H Reply to Notice of Appeal 1.

<sup>33</sup> Despite the procedural difference between the two cited decisions, the effective result is the same. In both instances the party was allowed to provide the updated information, which is what the Board has done in the instant proceeding as well.

Regardless, the July 2, 2015 publication of D&H's supplemented verified notice of exemption essentially restarts the exemption process and timeline, just as if the Board had denied D&H's original verified notice without prejudice to re-filing. Furthermore, D&H states in its supplement that it "is republishing its newspaper notices and is providing corrected notices to the 49 C.F.R. § 1152.50(d)(1) parties,"<sup>34</sup> and therefore Riffin's arguments with regard to whether or not D&H has provided proper notice or "falsely certified" that it has provided proper notice are moot. Nor can Riffin show that any harm to interested parties resulted from the Director's decision to permit supplementation in this proceeding.

For the foregoing reasons, Riffin's appeal of the Director's May 13, 2015 order will be denied.

Offers of Financial Assistance. On April 20, 2015, Riffin filed a notice of intent to file an OFA and a motion to toll the time to file an OFA in this proceeding. Since that date Riffin has filed several supplements to his notice of intent to file an OFA.

Pursuant to the procedural schedule contained in the reissued notice of exemption, served and published in the Federal Register on July 2, 2015, parties wishing to participate in the OFA process must abide by the relevant deadlines set forth in that notice.<sup>35</sup>

Parties are directed to file comprehensive pleadings to the extent possible, and parties are reminded that leave to amend filings before the Board is a matter of Board discretion under 49 C.F.R. § 1104.11.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Riffin's motion to consolidate and petition to revoke are denied.
2. SMART/TD-NY's petition to revoke and for stay of exemption, request to consolidate, and motion to strike are denied.
3. Riffin's appeal of the Director of the Office of Proceedings' May 13, 2015 order is denied.
4. Parties wishing to participate in the OFA process are required to file all OFA-related materials pursuant to the procedural schedule in the reissued notice of exemption served and published in the Federal Register on July 2, 2015.

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<sup>34</sup> D&H Suppl. to Verified Notice of Exemption 2.

<sup>35</sup> For example, Riffin must submit a new notice of intent to file an OFA if he wishes to continue to pursue an OFA here.

5. All other filing deadlines in this proceeding are subject to the procedural schedule in the reissued notice of exemption served and published in the Federal Register on July 2, 2015.

6. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.